CHAPTER 12

Podcasting Arbitration: Two Years with the 'Arbitration Station'

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§12.01 INTRODUCTION

Before the turn of the century, practitioners in our community only engaged with one another by attending international conferences or passively responding to academic publications. However, in the age of LinkedIn and affordable travel, we can now more easily connect, share, compare and discuss. The field of international arbitration transitioned from an amalgamation of pockets of domestic arbitration cultures into a globalized field. It became more the rule, rather than the exception, to meet a Viennese professional at a conference in Buenos Aires, who is licensed in Australia, but works for a law firm in Seoul.

After a few years in this field, we noticed that arbitration practitioners are a special breed of person. They are intellectual, yet uncharacteristically social. If the legal profession were the deep blue sea, arbitration practitioners would be dolphins. They spend most of their time and energy seeking out relationships, and their standing in society is determined by the interactions they have with others.

We decided to capitalize on an industry filled with type-A personalities who want to know the most and be known by most. Adapting to the social media generation, we realized that there was (already) an app for that. The only medium untouched by our industry was podcasting. After a quick search, we realized that no current podcast exclusively discussed issues of arbitration. After the forefather of arbitration podcasting, Michael McIlwrath, ended his podcast for the International Institute for Conflict Prevention and Resolution (CPR Institute) in 2011, there was a void to fill.

Enter: The 'Arbitration Station'.

§12.02 THE INITIATION OF THE 'ARBITRATION STATION'

We met each other while working at the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). After a few short weeks of exchanging professional pleasantries in the hallways, we decided to meet outside of work, which inevitably lead to a discussion of a plethora of arbitration topics. What was most refreshing for us is that we could discuss these issues with a more pedestrian vocabulary and without the fear of being wrong or corrected.

Joel was born and raised in Sweden, pursuing a career in academia, and defended his home country's rich history of arbitration. Brian relocated to Sweden from Los Angeles, starting his career in private practice and rebuked any inclination of fitting within a traditional arbitral mould. Both shared the passion for the field and the interest in expanding Sweden's notoriety abroad.

One night in a wine bar on Malmskillnadsgatan in Stockholm, Sweden, we engaged as usual in some light-hearted debate on some arbitration topic (which now escapes the authors' memory). We both agreed that the most fruitful discussions in our field happened during the informal debates after a conference, in an obscure city, over a glass of wine. It was the only moment when serious professionalism gave way to unobstructed discourse, since everyone knew that no one would remember or – worse – hold it against you in a future arbitration. We wanted to capture that moment, bottle it up and present it as a product for people to consume – create a space for informal discussion on serious topics in our field. And so, we started to record our conversations and, in the summer of 2017, we started to publish them.

§12.03 THE FORMAT

Each episode generally consists of three segments. As a rule of thumb, the two first are rather substantive – examples include the *Salini* criteria in investment arbitration, the proper use of Redfern Schedules and the proliferation of specialized LLM programmes in arbitration – and have been preceded by substantive research on behalf of the hosts (or, as discussed below, by guests that are invited for their expertise). In true podcast form, the tone is informal and could be confused with a conversation between friends (friends who happen to talk primarily about arbitration, that is).

In addition to the two substantive segments, each episode is concluded with a third topic which is generally more informal. As a joke, we initially called this segment 'Happy Fun Time', a name which stuck. Topics covered in the Happy Fun Time ('HFT') segments include, for example, how to behave when travelling with colleagues, what a Queen's Counsel really does, and the proper protocol for pronouncing names that sound foreign to you. We wanted inane topics that struck a chord with every arbitration practitioner – something we all think, but never say out loud.

We received a small funding package from the Young Arbitrators of Sweden organization that would pay for our domain name and two Yeti microphones, engaged the only lawyer we knew that could navigate a computer program aside from Microsoft Word (Jan Kunstyr), downloaded some open source music and away we went!

§12.04 A CONVERSATION BETWEEN TWO HOSTS

With limited resources and an even more limited network, the podcast started off with several episodes of the two co-hosts trying to recreate the perfect blend of arbitration discourse in a conversational tone. It was not long before we forgot about the microphone, looked across the table and decided to be unapologetically us. From Brian's annoyingly staccato laughter, to Joel's immutable monotone delivery, you can tell from the very first episode that we were not trying to make the podcast into something other than a casual interaction between arbitration lawyers.

For some reason, despite our incessant attempts to make the podcast a highbrow broadcast of unwavering academic integrity, most of our feedback commented on the appreciation of our conversational tone and relaxed attitude. For us, the feedback was perplexing. We started the podcast in an attempt to feed people another outlet that would satisfy their need to consume arbitration news, yet people were only focusing on our interaction. It was flattering, but for us it almost missed the point.

However, after a few podcast team meetings (read: conversation on a couch), we realized that the main purpose of the podcast was not going to be to teach people the doctrine of international arbitration, but instead the soft skills of international arbitration. We would create a weekly exposé about how the true beauty of our industry lies in the unique blend of social interactions we experience at our work, peppered with a few moments of 'wisdom' and (hopefully for Joel) even fewer moments of investigative journalism.

§12.05 EXPERIENCES FROM PODCAST CONVERSATIONS

Although the standard format of the podcast has been as described above – i.e., a conversation between a scholar-to-be and a law firm associate – most episodes have also seen guests. Over the course of three seasons, we have spoken to senior arbitrators and junior associates, to doctoral candidates and professors, and to in-house counsel and institutional representatives. Usually, the guest is invited in order to provide a specific expertise on a substantive issue, be it sports arbitration or damages calculations. Sometimes, however, the conversations are more macro-focused, such as when we talked to Mexican arbitrator Claus von Wobeser about his forty-year long career and the lessons he learned. (Shockingly, he told us that arbitration practitioners used to dictate an entire submission start-to-finish and were therefore much more comfortable with structuring clear and concise arguments.)

One such macro-discussion of note was with Veijo Heiskanen who localized the defining trend in the current age of arbitration to be the management of third-party interests and international arbitration. We met Veijo at a conference in Stockholm, and he reflected on his thirty years of experience in the field. He mentioned that in the 1980–1990s, the main dilemma the industry faced was how to create an international regime in arbitration. In that era, people were talking about a national arbitration that is detached from the local system and discussing how to balance the local systems with this dispute resolution procedure. The next era he pointed out was from the

1990s–2015, which presented a new dilemma on efficiency in arbitration. People at that time were discussing the administration of evidence, witness statements, expert reports, etc. Veijo then deemed the dilemma of the modern era to be debating policy – 'we are all policy makers now'. The industry today is focused on managing third-party influences in arbitration, both in investment and commercial arbitration. Issues such as participation of non-disputing parties, *amici* submissions, the publication of awards and third-party funding are now at the forefront of conferences and coffee house debates. He left us with the question: how do we retain the soul of arbitration with all of these new players?

Over three seasons, we, of course, had conversations with a slightly narrower focus, such as the much-cited interview with political scientist Taylor St. John, who had just finished a book on the history and development of International Centre for Settlement of Investment Disputes (ICSID). She invited our listeners to stop and evaluate the founding myths of investment arbitration. For example, she debunked the myth of 'additional investments', what some say to be the core value of investment arbitration. This myth was started by Aron Broches, who argued that providing investors with access to arbitration will remove the impediments of capital to flow where it would be most effective. Taylor St. John unveiled some fascinating details on how that just was not the case for drafters of the ICSID Convention. She mentioned how British officials wrote contemporaneous notes about how they preferred ICSID to other solutions because it would actually *not* invite the flow of investments to new countries.

We also had a discussion with a Cambridge academic, Bruno Gelinas-Faucher, about the practice of International Court of Justice (ICJ) judges who 'moonlight' as arbitrators. In a spine-tingling turn of events, after we interviewed Bruno on the podcast, the ICJ actually decided to adopt new restrictions on sitting Members of the Court acting as arbitrators in inter-State and mixed arbitration. Though we all know it was a happy coincidence, we sometimes like to peddle the fairy-tale (at least in our own minds) that we had something to do with the furtherance of that discussion.

After a successful first season on the podcast, Joel had the idea to create a theme for the second season of the podcast – the 'Place of Arbitration' series. Staying true to the fundamental tenets of the podcast, Joel's idea was to exploit our international network of listeners, colleagues and friends and try to create a database of information on the arbitration law and culture in different jurisdictions around the globe. We thought that it would not only peak the curiosity of our international listenership, but also provide a foundation for people who needed a quick introduction to a jurisdiction's legal framework.

With a season of 16 episodes, we had the difficult task of finding 16 lawyers from 16 different cities in 16 consecutive weeks. Luckily, we were met with enthusiasm from the community and had the fortune to interview guests from, among other places, New York, Lisbon, Abuja, Frankfurt, Sydney, Miami and Helsinki. The most exciting aspect of the 'Place of Arbitration' series was not comparing the nuances of the arbitration law from each jurisdiction, but instead witnessing that great minds across the globe were all operating in and contributing to this unique field of law.

Occasionally, the HFT segment has been dedicated to topics that are neither happy nor fun, but which have felt appropriate to address in a forum, which reaches thousands of arbitration lawyers, many of whom are relatively junior. For example, as the #MeToo wave crashed over the world in general, we discussed what this meant for the field of international arbitration. In particular, since we are both white men, we tried to add our own perspectives to a discussion which had mostly – for better and for worse – been conducted by women in the field. Are we aware of our privilege, and of how we benefit from it? What can we do differently? We then crowd-sourced a plethora of input from our listenership to share their stories. The outpour was startling, but very moving.

Similarly, in early 2019, we did a HFT segment on LGBTQ + issues in arbitration. In preparation for the show, we had solicited experiences from listeners, which we used as a starting point for a larger discussion about the commonalities LGBTQ + lawyers have when dealing with partners, professors, clients or firm politics. After reading some of the experiences of our listeners, and interviewing one 'on air', we found out that there were some people that did not have the space or ability to tell their story. For us to be able to use our modest platform, and give a voice and space for sensitive issues, meant much more for self-promotion or promotion of the field.

§12.06 TAKING THE PODCAST ON THE ROAD

At the end of a presentation hosted by the Swedish Women in Arbitration Network (SWAN) one of the guests asked us what we saw as the future of our podcast. We were a bit stumped by the question given that we were content with just meeting our tight recording schedule. However, the question forced us to set goals and try to take our podcast to the proverbial next level.

For most podcasts, the next step is always taking the show on the road. To translate that in terms of arbitration, that meant our next step would be to attend conferences on behalf of the podcast. Since we both hated the sound quality of how live podcast shows were recorded, we decided to use conferences as the perfect location to trap a multitude of senior practitioners in one place at one time.

As our luck would have it, the International Council for Commercial Arbitration (ICCA) Congress in Sydney was just a few months away. We made it our goal to find an organization that would fund the podcast (noticing a theme?) to travel to Australia and report live from the Congress. We reached out to the ICCA Congress organizers, and they loved the idea and were more than supportive. They gave us access to the list of speakers, all well-known practitioners in the field and reserved a separate room to serve as our 'studio' throughout the conference (we had to spend a few hours converting the room into an audio-friendly environment, including borrowing soft-surface furniture and plenty of tablecloth from other parts of the conference centre). We think the positive reception from the organization committee was due the perceived innovation of the initiative. For us, it gave us access to contact incredible guests, but for them it added a creative element to the Congress.

After pitching a few organizations to fund two people to travel across the world, the Swedish Arbitration Association (SAA) and Brian's former firm, Mannheimer Swartling, were willing to help. As one can tell, the Swedish arbitration community has been an invaluable source of support for the podcast.

So we travelled all the way to Australia and saw almost nothing of the Congress itself. Almost every speaker we contacted to be a guest on our podcast had accepted. We were, once again, surprised. It is hard enough to get your own firm's partner to respond to your emails on a case you are working on, let alone schedule a world-renowned arbitrator to sit down for an hour at the Olympics of arbitration. Yet they accepted, and we were able to record three entire episodes from the Congress. We thank the ICCA and the organizers for their support as the experience gave the podcast a confirmed sense of legitimacy.

Without delving into the specifics of the topics we addressed, we realized why everyone was willing to sit down with us and have a conversation. First and foremost, every senior practitioner had a project that they wanted to promote – whether it was Catherine Rogers' Arbitrator Intelligence initiative or Michael Weininger and Campbell McLachlan's second edition of their book. We noticed an entrepreneurial side of our industry that simmered underneath the case work and PhDs. Second, everyone wanted to talk about it. In an industry where our name is our brand, everyone wanted to share their efforts with as many people as possible in order to demonstrate a commitment to the field and – subtly – their intellectual prowess. That experience confirmed our intuition as to this innate obsession we all have for arbitration.

However, staying true to our original motivations for the podcast, some entertaining discussions leaked through the more doctrinal content. For example, on the back of the debate about how Donald Trump tried to enforce an arbitration agreement with adult film star Stormy Daniels and Mark Kantor spoke to us about the use of arbitration in employment contracts with summer associates at American law firms on issues of discrimination and harassment. Although the material was quite serious, the cadence and style of the discussion was comparatively informal.

The most nervous we ever were for a recording session was for our time with the current and former ICCA Presidents of that time, Gabrielle Kaufman-Kohler and Donald Donovan. They were both escorted into our 'studio', and we quickly realized that our makeshift room was innovative, but extremely embarrassing. To paint a clear picture of the room, you can imagine up-turned IKEA furniture with catering tablecloths strewn over in a haphazard manner. The two guests were escorted in by a *few* members of the organizing committee, and then we sat down to begin the interview. Within minutes, after the first communal laugh, the tension in the room lifted and we were able to engage in a meaningful discussion about the goals for the ICCA organization. Joel even had a chance to raise a pre-approved question about how ICCA had not yet signed the 'Pledge' (a movement in recognition of the under-representation of women in international arbitral tribunals). Though Donald publicly declared that ICCA would sign the 'Pledge' just moments before the interview, we again like to conveniently recount the story as if our journalism was affecting some small change.

If you listen to our ICCA-series, you will be able to hear some of the key players in the industry sit down with us one-on-one and talk about a topic they are passionate about. We noticed after ICCA that this idea was mutually beneficial – we were able to meet and discuss hot topics with senior practitioners and the conference received an innovative marketing campaign. Just as we had pitched the programme to the organizers, the idea was to deliver the messages and themes of Sydney to the rest of the world that steered clear from a twenty-four-hour flight day.

We therefore decided to package this service and market it to other international conferences. Since Sydney, we were fortunate enough to be invited by the International Chamber of Commerce in Paris (ICC) to broadcast live from the ICC European Conference, which is the kick-off event for Paris Arbitration Week. We were also invited by Juris Conferences in Washington D.C. to present competing articles on the issue of costs in investment treaty arbitration, where the organizers specifically communicated their hope to see some of the podcast 'banter' on stage. We are hopeful that this trend of invitations continues into the future.

§12.07 THE MAIN CONCERNS

Without fail, the primary reaction we receive from people when discussing our podcast is: 'Aren't you worried about being wrong?'

In a field where there is absolutely no margin for error, we decided to create a podcast where hours of interviews could be replayed, analysed, critiqued, cited and used against us for the rest of our careers. Admittedly, we did not fully appreciate this fact when we started the podcast, yet we continued to create content.

What we realized was that no one cared if we made mistakes so long as we continued to deliver on our promise of content and create a space for discussion. We had one episode where we discussed the steps to becoming a barrister in the UK and, despite talking to current barristers and researching online, we heard back that our reporting was fundamentally flawed on certain points. Though we both shuddered in embarrassment once we received the e-mail from a listener, we found comfort in the fact that the point of the podcast is not to be the King James Bible of arbitration, but the *New Yorker*.

Our response to everyone's concern is that the formal discussions and paranoia of making a mistake stifles valuable conversation from the fringe players of arbitration. The younger generation and the practitioners from arbitration-poor cultures fear that they are not competent enough to contribute, nor experienced enough to provoke new thoughts. However, when the discourse is filled with the infinite wisdom of senior practitioners from Western countries, then only innovation suffers. We understand that the legal profession is armoured with a strong history of tradition, but we also must appreciate that the same armour can immobilize us. We therefore do not cower at the thought of being cited as a source in our future endeavours and instead invite everyone to do so.

The second frequent question from listeners is 'Won't you run out of topics soon'? So far, that has not been an issue. The law develops, new cases come out and

the culture of the field is transformed over time. That being said, from time to time we have had to dig a bit deeper into the bucket of arbitration-related topics: for example, Joel had to work hard to convince Brian that 'service of notice' was worthy of a twenty-minute segment on its own, or that 'dress codes' as a HFT episode would not make us sound like Cosmopolitan magazine.

As an outgrowth of that desire to change the way in which we discuss arbitration, we are using the podcast to promote the space of informality in arbitration discourse. We want to let inclusion and discussion overpower perfection and correctness. This also means that seemingly 'mundane' topics occasionally have a justified place in the conversation.

§12.08 LESSONS FOR THE FUTURE

The experience of creating this podcast has reinforced the often-cited notion of arbitration being a 'people's business'. Even at its origins, arbitration was a business where partners would make phone calls to their network to find out which arbitrator he or she should appoint for a pending matter. Like dolphins, this industry thrives off social interaction, cultural comparison and intellectual discourse. We want the podcast to use the technological resources at our fingertips to enhance the discussion – to invite insight from our colleagues around the world and modernize our traditional profession.

Part of that is recognizing that we do not always need to know everything or be the most prepared. That is where the 'glass of wine after the conference' comes in: during the conference, arbitration lawyers are only confident speaking – be it from the podium or in a crowd – if the topic concerns something they know very well, or at least have experience with. After the formal programme, however, we give ourselves more latitude to ask stupid-sounding questions or explore new paths that we would not be comfortable doing in a more public setting. The reason for the holding back is, once again, that this is a people's business and arbitration lawyers 'put food on the table' based on their personal brand. Therefore, we want to be perceived as sophisticated, prepared and all the other adjectives that the various professional rankings use when describing well-regarded lawyers.

With the podcast, we have tried to challenge this idea that you should only speak of things that you know. On air, we have strived to ask foolish questions (how else do you learn?) and actively decided against editing out snippets that, quite frankly, make us sound unsophisticated or unprepared. This is purposeful, as we believe frank intellectual exchange cannot thrive in an environment when the participants are thinking about how they are perceived.

And so far, it has worked. We have received a surprising amount of feedback from senior arbitration lawyers from all over the world who are listening and reacting to our podcast. The feedback generally relates to how refreshing it is to hear (seemingly competent) professionals talk about the relevant issues in our field, but in a way that is informal and conversational. Our listeners do not have to worry about focusing intently or missing a pivotal detail, there is no test or cross-examination at the end of each episode. After all, we are only people, and we have to relate to each other based

on this premise. We humbly hope to continue to be what a diplomat and law professor in Mexico City once described us as: ‘really funny and interesting’. Whether or not those characteristics are what most arbitration lawyers strive for is a matter for another book … .